



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E.C. Development, Inc.
File: B-231523
Date: September 26, 1988

DIGEST

Even though an individual surety proposed by a low bidder failed to disclose (1) two performance bond obligations on performed contracts where only the warranty remains and (2) a bid bond, as required by item 10 of the Standard Form 28, "Affidavit of Individual Surety," a contracting officer cannot automatically reject the bid, since what is involved is a matter of bidder responsibility, not bid responsiveness. A reasonable basis to find the surety unacceptable for such nondisclosures exists in circumstances where there is an indication of a continuing pattern of nondisclosure by the surety or where the nondisclosure causes the contracting officer to be concerned about whether the surety's net worth is sufficient to cover the bond obligations.

DECISION

E.C. Development, Inc., protests the rejection of its bid and award of a contract to R.C.R. General Contractors, Inc., under invitation for bids (IFB) No. N62474-85-B-5438 issued by the Western Division, Naval Facilities Engineering Command, for the construction of an engineering support facility at Port Hueneme, California.

We sustain the protest.

Ten bids were received by bid opening on April 14, 1988. E.C. submitted the low bid of \$2,258,225 and R.C.R. the second low bid of \$2,823,300. In response to the IFB bid guarantee requirements, E.C. submitted two Standard Form (SF) No. 24 bid bonds from two individual sureties. See Federal Acquisition Regulation (FAR) § 28.202-2(a) (1984) (bid guarantee requirements can be satisfied by the submission of bid bonds by two individual sureties, so long as each surety has sufficient net worth to cover the penal amount of the bid bond). E.C. also submitted two SF-28s, "Affidavit of Individual Surety," that had been filled out

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by each individual surety. See FAR §§ 28.202-2(a) and (b) (bidders are required to submit SF-28s whenever individual sureties are used, so the contracting officer can determine their acceptability). The SF-28s submitted for E.C.'s sureties indicated both had sufficient net worth to cover the potential bond liability. In response to item 10 of the SF-28, which requires the surety to identify "all other bonds" on which he or she is surety, each surety submitted a list of contracts on which he was a surety.

The day after bid opening, April 15, 1988, E.C. notified the Navy that it had made a mistake in its bid because of a clerical extension error that would increase its bid price by \$309,000.^{1/} On May 6, 1988, before it had made any determination on E.C.'s alleged mistake, the Navy rejected E.C.'s bid as nonresponsive because it found that one of E.C.'s individual sureties, Mr. Richard Somers, had not disclosed all bonds on which he was surety as required by item 10 of the SF-28. According to the Navy, Mr. Somers did not list two performance bonds on contracts that had been performed, but which were still within the warranty period, nor did he list a bid bond he issued on another solicitation. On that same date the Navy made award to R.C.R.

On May 11, E.C. protested this award to the Navy, which the Navy denied on May 19. E.C. then protested the award to our Office noting, among other things, that R.C.R. had also used Mr. Somers as a bid bond surety. On June 30, the Navy found that Mr. Somers had submitted for the R.C.R. bid the identical list of bonded contracts as he submitted for the E.C. bid. As this list omitted the same two performance bonds that had been used to justify the rejection of E.C.'s bid, the Navy terminated R.C.R.'s contract for the convenience of the government on July 12, 1988.^{2/}

^{1/} E.C.'s individual sureties' net worths were sufficient to cover this increased bid price.

^{2/} The bid bond not listed on Mr. Somers' SF-28s was issued before the execution of the SF-28 for E.C.'s bid, but after the execution of the SF-28 on R.C.R.'s bid. Therefore, Mr. Somers did not fail to disclose this bid bond obligation in the R.C.R. SF-28 since it did not exist when that SF-28 was executed.

The Navy requests that we dismiss the protest as academic since it has terminated R.C.R.'s contract. Dismissal is not appropriate, however, because the Navy apparently still plans on making award under this IFB and E.C.'s basic complaint is that it is entitled to the award as the low bidder.

The SF-28, "Affidavit of Individual Surety," is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. O. V. Campbell & Sons Industries, Inc., B-229555, Mar. 14, 1988, 88-1 CPD ¶ 259; River Equipment Co., Inc., B-227066, July 24, 1987, 87-2 CPD ¶ 84. Therefore, the Navy's position that E.C. was "nonresponsive" is incorrect. See Singleton Contracting Corp., B-216536, Mar. 27, 1985, 85-1 CPD ¶ 355; O. V. Campbell & Sons Industries, Inc., B-229555, supra. Nevertheless, a contracting agency has the discretion to consider the failure of an individual surety to disclose all bond obligations as a factor in determining the responsibility of the bidder and its sureties. Dan's Janitorial Service, Inc., 61 Comp. Gen. 592 (1982), 82-2 CPD ¶ 217; River Equipment Co., Inc., B-227066, supra.

In the present case, the surety's representative does not deny that Mr. Somers had issued the performance bonds, the existence of which the Navy states was not here disclosed; the representative instead states the "jobs were 100% complete prior to [this solicitation]. These jobs are in the warranty period and . . . we may not agree with the contracting officer's decision, referencing warranties." (Emphasis supplied.) However, individual sureties are required to disclose, in response to item 10 of the SF-28, performance bond obligations on performed contracts where only the warranty remains and the surety argues it is not liable under the warranty. American Federal Contractors, Inc., B-222526, supra at 2; Singleton Contracting Corp., B-216536, supra. This is so because the surety is obligated to disclose all outstanding bond obligations, regardless of the actual risk of liability on those obligations, to enable the contracting officer to make an informed determination of the surety's financial soundness and integrity. Dan's Janitorial Service, Inc., 61 Comp. Gen. supra, at 594, 82-2 CPD ¶ 217 at 3.

With regard to the undisclosed bid bond, the surety's representatives states that item 10 of the SF-28 does not require the disclosure of bid bonds. However, item 10 requires the disclosure of all bond obligations; there is no exemption for bid bond obligations. See River Equipment Co., Inc., B-227066, supra (bid bond obligations must be disclosed in response to item 10 of the SF-28).

It is clear, therefore, that Mr. Somers' SF-28 should have included the two performance bonds and the bid bond on which he remained liable. See River Equipment Co., Inc., B-227066, supra. While this puts into question Mr. Somers' acceptability, his failure to list these bonds, however, does not automatically warrant rejection of E.C. Rather, as indicated above, this failure is one factor that should be considered in evaluating the acceptability of an individual surety.

We have held that a contracting officer has a reasonable basis to reject a bidder as not responsible in circumstances where there is an indication of a continuing pattern of nondisclosures by an individual surety, see Dan's Janitorial Service, Inc., 61 Comp. Gen. supra at 594; River Equipment Co., Inc., B-227066, supra, or where the nondisclosure causes the contracting officer to be concerned about whether the surety's net worth is sufficient to cover the bond obligations. See American Federal Contractor, Inc., B-222526, July 25, 1986, 86-2 CPD ¶ 114. Conversely, in the absence of such circumstances, we think that a contracting officer may not automatically reject a bidder, whose otherwise acceptable individual surety makes an apparent good faith effort to list its bond obligations, for the sole reason that the surety failed to list all other obligations. An inflexible policy that permits an agency to automatically reject bidders in this situation is tantamount to converting that which is clearly a matter of bidder responsibility to a matter of bid responsiveness. See Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. 87-2 CPD ¶ 3; T&A Painting Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. —, 87-1 CPD ¶ 86.

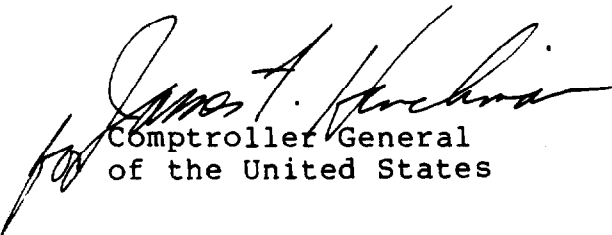
The Navy has not alleged any other instances where Mr. Somers failed to disclose bond obligations, much less allege that this is part of a pattern of nondisclosure. Indeed, here Mr. Somers disclosed 30 bond obligations totaling approximately \$38 million in response to item 10 of SF-28, and there is no indication that his failure to list the performance bonds and bid bond was anything other than a good faith error.

Moreover, Mr. Somers' claimed net worth is approximately \$68 million, which is far greater than his listed bond obligations. Although the record does not indicate the amount of the three undisclosed bonds, the Navy has not questioned

Mr. Somers' net worth. Consequently, without further investigation, it appears that Mr. Somers had more than sufficient net worth to cover the bid bond in question here. Compare American Federal Contractor, Inc., B-222526, supra, where the individual surety's nondisclosures of bond obligations properly caused an agency to be concerned about the surety's net worth.

We recognize that a contracting officer has broad discretion in making responsibility determinations. However, here the record indicates he did not reasonably exercise his judgment concerning the surety's acceptability, but instead rejected the bid as nonresponsive without otherwise investigating the surety's acceptability and responsibility. See O. V. Campbell & Sons Industries, Inc., B-229555, supra at 2. We therefore sustain the protest.

We are recommending that the Navy determine whether Mr. Somers is an acceptable individual surety in accordance with the guidance set forth in this decision. If the Navy determines that Mr. Somers is acceptable and if E.C.'s mistake in bid can be corrected, award should be made to E.C. if it is otherwise a responsible contractor. Further, under the circumstances, we find that E.C. is entitled to the costs of filing and pursuing its protest. Kirila Contractors, Inc., B-230731, June 10, 1988, 67 Comp. Gen. ___, 88-1 CPD ¶ 554.


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